In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 1079

WESTERN RADIO CORPORATION, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. F, pp. 80–86) is reported at 339 F. 2d 937. The opinion of the Commission (Pet. App. C, pp. 55–73) and its Opinion on Respondents' Exceptions to the Proposed Order (Pet. App. E, pp. 76–79) are not reported.

JURISDICTION

The final decree of the court of appeals (Pet. App. H, pp. 88–89) was entered on January 27, 1965. The petition for a writ of certiorari was filed on April 19, 1965. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

774-205—65

QUESTIONS PRESENTED

The Federal Trade Commission found that petitioners violated Section 5 of the Federal Trade Commission Act by falsely advertising their portable radio transmitter. The questions presented are whether the court of appeals correctly ruled:

(1) that the Commission's finding that petitioners misrepresented the effective ranges of their transmitter is supported by substantial evidence;

(2) that the Commission's order is proper for curing the violations of law found to exist; and

(3) that there could be no reversible error in the Commission's denial of access to a witness's report for impeachment purposes, since the Commission placed no reliance on the witness's testimony in reaching its decision.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. 45, provides in pertinent part:

> (a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.
>
> * * * * *
>
> (6) The Commission is empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

STATEMENT

Petitioners manufacture and distribute a portable radio transmitter called the "Radi-Vox." After a

full administrative hearing the examiner found, and the Commission agreed, that petitioners' advertisements violated Section 5 of the Federal Trade Commission Act by misrepresenting (1) the effective range Radi-Vox would transmit without wires or hookups, (2) the nature of the service guarantee attaching to Radi-Vox, and (3) that no license is required to operate Radi-Vox. (Pet. App. A, pp. 21–51; Pet. App. C, pp. 55–73.) A cease and desist order was entered. Petitioners sought review in the court of appeals, which found the Commission's order to be supported by substantial evidence and enforced it with a minor modification. (Pet. App. F, pp. 80–86; Pet. App. H, pp. 88–89.)

The Commission's finding that petitioners had misrepresented the effective range of broadcast without wires or hookups was supported by tests made on two transmitters, which revealed their transmission capabilities to be well below the advertised claims. (Pet. App. C, pp. 58–62.) Petitioners offered evidence of no contrary tests except some made with the aid of wires and hookups, which even then fell short of the advertised claims. (Pet. App. C, pp. 62–63.) The court of appeals found that there was thus substantial evidence in the record to support the Commission's finding that petitioners had misrepresented the range of their transmitters without wires or hookups (Pet. App. F, pp. 82–84) and enforced an order requiring petitioners to refrain from representing that the transmitters have specified effective ranges unless they are able to establish that the transmitters have such capa-

bilities. (Pet. App. F, pp. 84–85; Pet. App. H, pp. 88–89.) [1]

The Commission's conclusion that petitioners' advertising misrepresented the service guarantee attaching to the product has not been challenged, and petitioners do not object to the order that advertising references to the guarantee conspicuously disclose all of its terms and conditions.

Similarly, petitioners do not question the Commission's finding that they had falsely advertised that no license was required to operate their transmitters. This finding was based upon tests showing that when Radi-Vox was used in accordance with the recommendations made in the accompanying instruction sheet it emitted a signal of sufficient strength to require a license from the Federal Communications Commission. (Pet. App. A, pp. 41–47; Pet. App. C, pp. 65–70.) However, petitioners do question the need for the order entered by the FTC, in view of changed instructions now being issued by the petitioners, instructions which no longer suggest the type of operation for which an FCC license would be necessary. (Pet. App. C, p. 71.)

Finally, the court rejected petitioners' claim that they had been denied a fair hearing because they were not given access to a Commission witness's investigative report, which they sought for impeachment

[1] The court of appeals added the words "are able to" to the requirement that petitioners establish the ability of the transmitters to perform as advertised in the future. The court's purpose was to make it clear that petitioners would be free to advertise specific claims if they had at hand the means to establish the truth of the claims upon inquiry of the Commission's Compliance Division. (Pet. App. G, p. 85; Pet. App. H, p. 89.)

purposes. The court held that the error, if any, was harmless, for the Commission expressly refrained from relying upon the witness's testimony. (Pet. App. F, p. 86.) The court also noted that the document was only a bare memorandum of transmittal, having no value for purposes of impeachment. (*Ibid.*)

ARGUMENT

1. The court of appeals correctly concluded that tests made by Commission witnesses adequately supported the Commission's finding that petitioners' advertisements exaggerated the effective ranges over which Radi-Vox would transmit without wires or hookups (Pet. App. F, pp. 82–83). Petitioners' argument, that proof based upon the testing of only two transmitters cannot support the findings, was correctly rejected by the court (Pet. App. F, p. 83). As the court below noted, petitioners offered no evidence showing that any of the transmitters would work as advertised, since all of petitioners' tests were made with supplementary wires and hookups. (Pet. App. F, p. 83; Pet. App. C, pp. 62–63.)

2. Having found that petitioners misrepresented the effective ranges of their transmitters without wires and hookups, the Commission entered an order which, as modified by the court of appeals, requires that petitioners not advertise that their transmitters will transmit over specific distances unless they are able to establish that they will in fact so transmit. (Pet. App. H, p. 89; Pet. App. F, p. 85; Pet. App. O, pp. 74–75.) Essentially, the order prohibits petitioners from falsely advertising the capabilities of their transmitter—the existing practice which the Commission

had found to be illegal. (Pet. App. F, p. 85.) Provisions which thus leave the truth of an advertisement or a representation as a potential issue in a later enforcement proceeding have been employed quite frequently in previous Commission orders which have been approved by the courts. See *Giant Food, Inc.* v. *Federal Trade Commission*, 322 F. 2d 977, 979, n. 2, 987 (C.A.D.C.); *Regina Corporation* v. *Federal Trade Commission*, 322 F. 2d 765, 769, 770 (C.A. 3); *Holland Furnace Co.* v. *Federal Trade Commission*, 295 F. 2d 302, 304, 306 (C.A. 7); cf. *Federal Trade Commission* v. *Civil Service T. Bureau*, 79 F. 2d 113, 115–116 (C.A. 6). In *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 53–54, relied upon by petitioners, the Commission's order left the ultimate conclusion of injury to competition to the enforcement proceeding, whereas here only a specific question of fact is left to such a proceeding. As the court of appeals pointed out (Pet. App. F, p. 85), the usual rules as to burden of proof would be followed in the event of a later civil penalty action for violation of the order. The precise allocation of burden of proof in a proceeding for violation of the Commission's order is, in any event, most appropriately resolved in the subsequent violation proceeding and review of that issue at this time is therefore unwarranted. See *Vulcanized Rubber and Plastics Co.* v. *Federal Trade Commission*, 258 F. 2d 684 (C.A.D.C.).

3. There was no prejudicial error in denying petitioners access to witness Snavely's investigative report for possible impeachment purposes. The Commission expressly disclaimed any reliance on Snavely's testimony (Pet. App. C, p. 72) and other witnesses

gave substantial testimony supporting all of the Commission's findings (see Pet. App. C, pp. 58–59, 60–61, 66, 68, 72 n. 13 and accompanying text). The court of appeals enforced the order on this basis (Pet. App. F, p. 86). Accordingly, no question of substance relating to the rule of *Jencks* v. *United States*, 353 U.S. 657, is presented.[3]

4. In this Court petitioners do not challenge the Commission's finding (Pet. App. C, pp. 65–72), upheld by the court of appeals (Pet. App. F, pp. 83–84), that petitioners' advertisements misled purchasers into believing that no license was required to operate their transmitters, whereas petitioners' instruction sheet counseled methods of operation which do require an FCC license. On the basis of this finding, the Commission ordered petitioners not to advertise that no license is required unless they also state the conditions under which a license is necessary. Petitioners claim that the Commission exceeded its authority, in view of petitioners' adoption of a new, amended instruction sheet which does not describe methods of operations which require a license. The amended instructions, however, were issued after the Commission had issued its complaint and it is well settled that the abandonment of an illegal practice after the Commission issues its complaint, does not prevent the Commission from framing an order prohibiting such practice. *Coro, Inc.* v. *Federal Trade Commission*, 338 F. 2d 149, 153

[3] Both the Commission and the court of appeals looked at the report and the court described it as a "skeletal memorandum of transmittal consisting of one page, forwarding * * * transmitters and listing field reports submitted, with no value for impeachment purposes." (Pet. App. F, p. 86.)

(C.A. 1), certiorari denied, March 29, 1965, No. 885, this Term; *Galter* v. *Federal Trade Commission,* 186 F. 2d 810, 812–813 (C.A. 7), certiorari denied, 342 U.S. 818; *Eugene Dietzgen Co.* v. *Federal Trade Commission,* 142 F. 2d 321, 330–331 (C.A. 7), as modified on denial of rehearing May 3, 1944, certiorari denied, 323 U.S. 730. Without the affirmative disclosure here required, petitioners would be entirely free to resume their former illegal practice. Having broken the law, petitioners can expect some "fencing in." *Federal Trade Commission* v. *National Lead Co.,* 352 U.S. 419, 431.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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